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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. ORACLE AMERICA, INC., Defendant.	OALJ Case No. 2017-OFC-00006

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL AND FOR ORDER SETTING PRODUCTION SCHEDULE

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INTRODUCTION

OFCCP moves to compel Oracle to produce key documents by set deadlines and to produce employee contact information and internal analyses of its hiring and compensation practices. It is now seven months since OFCCP first sent discovery requests and three months since this Court ordered the parties to start producing documents, and yet Oracle has produced *no* new data, *no* privilege log, and of the approximately 23,000 pages it has produced, much of it is information OFCCP already had. With the majority of time allotted for fact discovery elapsed, despite its diligence, OFCCP has been entirely deprived of *any meaningful* substantive discovery. OFCCP is already seriously prejudiced by the delay and even if Oracle were to provide all responsive documents *today*, the deadlines for the close of fact discovery and expert reports deprive OFCCP a meaningful opportunity for discovery in this large and complex case, in which Oracle controls virtually all of the data and documents relevant to claims.

On August 17, 2017, Oracle finally offered to produce documents responsive to OFCCP's initial set of RFPs by certain dates but will not agree to provide critical discovery before October, paralyzing OFCCP's discovery for two more months. This is untenable under the current case schedule. Once that production arrives, OFCCP would have only three months to review tens of thousands of documents and data sets for tens of thousands of individuals, request follow-up discovery, and take depositions. Additionally, these three months will be insufficient for OFCCP's experts to analyze this newly obtained evidence and prepare reports. Accordingly, OFCCP requests the Court order a production and case schedule that permits OFCCP to obtain meaningful discovery on its claims.

Aside from the schedule, two substantive issues persist. Oracle remains unwilling to provide: (1) internal analyses and documents it prepared pursuant to OFCCP regulations and (2) employee contact information.

FACTUAL BACKGROUND

As with most employment actions, the vast majority of relevant information—including data about its applicants and employees, resumes, notes of interviews, emails about hiring and

compensation decisions, its hiring and compensation policies, and correspondence with recruiters and colleges—remains solely within Oracle's control. Seeking this critical information, OFCCP propounded document production requests on February 10 and 21, 2017. Decl. of Norman Garcia ("Garcia Decl."), at ¶4.

After seeking the Court's assistance to resolve Oracle's objections to the time frame and confidentiality of discovery that Oracle relied upon to block all discovery, at the Court's instruction, on May 18, the parties began a time-consuming meet and confer process to address Oracle's remaining objections. At the same time, Oracle refused to meet and confer about requests for data until OFCCP interviewed witnesses about Oracle's systems, whom Oracle finally agreed to provide informally in June. Garcia Decl. ¶5. Accordingly, this process moved slowly and failed to resolve many issues until OFCCP sought Court intervention in July.

To date, Oracle has produced only 23,053 pages of documents, many of which are emails between OFCCP and Oracle or duplicates of documents previously produced. Garcia Decl. at ¶6. Critically, Oracle has not yet produced the data needed for OFCCP's hiring and compensation claims. *Id.* The data that OFCCP requested and that Oracle represents that it is collecting includes numerous data fields that Oracle did not provide during the compliance review, such as educational background, recruiters' notes, compensation history, performance ratings, and a myriad of other data points. Garcia Decl. at ¶7, Bremer Decl. at ¶4. In addition, the data will cover five years, or five times the compensation data and more than three times the applicant and hiring data that Oracle provided during the compliance review. Signaling that OFCCP may need to perform additional work once it receives the data, Oracle cautioned that the data may be incomplete. Garcia Decl. at ¶8. Thus, OFCCP may need to extract information manually from source documents, such as resumes or other documents (which will number in the thousands), to amass a full set of data. Analyzing these entirely new databases, which will include detailed

information regarding over 25,000 individuals,[1] will take months. After review of the databases and additional information produced, OFCCP plans to conduct follow-up discovery, particularly in light of Oracle's tactic of not providing responsive information until OFCCP proves it exists.

Until yesterday, Oracle refused to commit to producing documents by a specific date. Bremer Decl. ¶3. Oracle now proposes the following deadlines:

- September 15: For RFPs 18, 25, and 39-40, provide a sample set of emails, which OFCCP could review, and propose search terms;
- October 1: Produce the database (which only contains data through January 17, 2017, and would need to be supplemented);
- October 15: Produce the remaining documents and privilege log.

OFCCP cannot agree to this schedule in light of the current case deadlines. Moreover, a privilege log is already overdue and should accompany each production. And, this provides no deadline for supplementing the database with 2017 data.

More than six months into discovery, Oracle has not produced the vast majority of documents requested in OFCCP's initial document requests, effectively preventing depositions of Oracle's compensation and hiring decision-makers and expert analysis of Oracle's data.

ARGUMENT

Because of the complex issues and the employer's control of the evidence in litigation seeking to redress employment discrimination, courts recognize "the necessity for liberal discovery." *Finch v. Hercules, Inc.*, 149 F.R.D. 60, 62 (D. Del. 1993) (citations omitted). Underscoring this point, in granting OFCCP's motion to compel, another ALJ has recognized that "[t]he issues at stake are great" in discrimination cases. *OFCCP v. JBS USA Holdings, Inc.*,

[1] As stated in the NOV, Oracle provided data during the compliance review for the period 2013 through June 30, 2014 showing approximately 6,800 applicants to the PT1 group. Connell Decl. Iso Defendant's Motion for Judgment on the Pleadings, Ex. B, p. 1. If similar numbers of applicants applied through the present, the data Oracle provides will include information for over 20,000 applicants. The data Oracle provided during the compliance review included approximately 3,500 employees in the Product Development, Support, and Information Technology lines of business (the lines of business for which OFCCP claims compensation discrimination) in 2014 alone. OFCCP anticipates that the total number of employees in these lines of business from 2013 through the present will be much larger.

2015-OFC-1, Order Granting Mot. to Compel at 9 (Apr. 22, 2016)

In a good faith effort to streamline discovery, after meeting and conferring, OFCCP limited most of its requests and made various compromises. OFCCP now seeks an order compelling the production of the documents Oracle will produced in response to the February RFPs by deadlines that permit OFCCP and its experts a reasonable amount of time to analyze the information and conduct follow up discovery, and to compel Oracle to produce employee contact information and Oracle's internal analyses of its compensation and hiring practices.

I. The Court Should Order Deadlines for Oracle's Document Production and Extend the Deadlines in this Case.

OFCCP's February RFPs requested that Oracle produce documents requested "within 25 days after these requests are served." Garcia Decl., Exs. 1-2. The Federal Rules required Oracle to either produce the documents requested within 25 days of the requests, as requested, or at "another ***reasonable time specified*** in the response." Fed. R. Civ. P. 26(b)(2)(B)(emphasis added). Oracle failed to produce documents in March, as requested by the RFPs, and failed to specify any time for its production, let alone a reasonable time.

Given Oracle's default, OFCCP requests deadlines for Oracle's production of documents responsive to the February RFPs, which the Court has authority to order under various rules. *See, e.g.*, 29 C.F.R. § 18.44(d)(6) (authorizing case management orders "[c]ontrolling and scheduling discovery"); Fed. R. Civ. P. 16(c)(2)(F) (same); *see also Bird v. Wells Fargo Bank*, 2017 WL 1213425, at *1, *7 (E.D. Cal. Mar. 31, 2017) (issuing detailed production schedule pursuant to Rule 16 as "discovery . . . has broken down"). OFCCP requests the schedule below:

- Produce the privilege log that it agreed to produce by June 12, 2017 within 3 days (updated to reflect documents withheld from the productions to date), and provide a privilege log with each batch of documents produced (Garcia Decl. at ¶ 9);
- Produce the databases no later than September 1, 2017 (Garcia Decl. at ¶ 7 (describing the data to be produced);
- Produce all other documents responsive to the February RFPs by September

15, 2017, excepting the emails subject to the sample-and-search-term methodology; and

- Produce all emails compiled through the sample-and-search-term methodology to which the parties agreed[2] by October 15, 2017.

Further, so it has certainty, OFCCP requests that Oracle declare, under oath, when its production for each RFP is substantially complete. *See, e.g., Abraham v. BP Am. Prod. Co.*, 2010 WL 1135746, *3 (D.N.M. 2010) (ordering such a declaration).

Oracle's recently proposed production schedule, which pushes deadlines out into October, is untenable. Particularly concerning is Oracle's inability to commit to producing its data until October 1, which will prevent OFCCP and its expert(s) from having sufficient time to analyze the data, conduct follow-up discovery (including depositions), manually input missing information, and prepare a report. OFCCP's trial preparation is paralyzed without this data. Oracle's inability to produce all documents until October also prevents OFCCP from taking depositions and conducting follow-up discovery. Given the volume of emails Oracle claims exists, it will take time to review them before and conduct follow-up discovery and depositions.

Equally concerning is that Oracle reneged on its commitment to provide a privilege log no later than June 12th. Garcia Decl. at ¶ 9. As discussed further below, Oracle is improperly withholding responsive and highly relevant documents or the grounds for withholding them, as required by Rule 26. *See* Fed. R. Civ. P. 26(a)(b)(5). Oracle's failure to produce privilege logs further delays inevitable disputes about documents Oracle is withholding.

Due to Oracle's failure to produce critical data and documents in spite of OFCCP's diligence in seeking them, and the prejudice OFCCP has suffered in hearing preparation, OFCCP proposed (and Oracle did not oppose) extending fact discovery by at least three months. *See*

[2] To address Oracle's burden objections, OFCCP agreed to work with Oracle to develop search terms to assist Oracle in identifying relevant documents for RFPs 18, 25, and 39-40. The methodology to which OFCCP agreed entails: (1) Oracle producing initial documents sets from defined three-month periods; (2) OFCCP reviewing those preliminary sets; (3) OFCCP proposing search terms to Oracle; (4) the parties meeting and conferring regarding those search terms, if necessary; and (5) Oracle reviewing and producing documents based upon the agreed-upon search terms. This methodology contemplates Oracle producing the initial sets promptly so that OFCCP can conduct its review and so the parties can agree to search terms. The October 15, 2017 deadline OFCCP proposes is the date by which the entirety of this process is complete, not the date by which Oracle produces the initial sets.

August 8, 2017, Bremer Ltr. to ALJ Larsen at 4; *see also*, Fed. R. Civ. P. 16(b)(4) (judge may modify scheduling order for good cause). OFCCP made this request based on the production schedule it had proposed. *Id.* However, if the Court orders Oracle's production schedule instead, permitting Oracle to produce data a month later than under OFCCP's proposal, OFCCP suggests that the deadlines be extended an additional month:

Close of Fact Discovery	Friday, May 18, 2018
Initial Expert Disclosures	Friday, June 08, 2018
Rebuttal Expert Disclosures, if any	Friday, June 29, 2018
Close of Expert Discovery	Friday, July 27, 2018
Deadline to File All Pretrial, Discovery, and Dispositive Motions (non-MIL)	Friday, August 03, 2018
Deadline to Oppose Dispositive Motions, if any	Friday, August 17, 2018
Deadline to File Reply ISO Dispositive Motion	Friday, August 31, 2018
Deadline to Meet and Confer re Prehearing Statement and Pretrial Filings, Including MILs, Prehearing Statement, Exhibit List, and Witness List (Pre-Hearing Order § 4.d)	Friday, September 28, 2018 Tuesday, October 16, 2018
Pretrial Conference	Monday, October 29, 2018
TRIAL (14 days)	Monday, November 12, 2018

Both of these schedules are aggressive, considering that this is a complex case, involving both hiring and compensation practices on the basis of both gender and race impacting tens of thousands of affected applicants and employees over a five-year time span. Over seven months have passed without Oracle producing critical documents, witnesses for deposition, or the new databases upon which OFCCP's case at hearing will hinge. The proposed schedule still requires a hearing less than two years after filing, while smaller and less complicated discrimination cases are routinely tried over two years after filing. *See* Parties' Jt. Case Mgmt. Stmt. at 21.

II. This Court should compel Oracle to produce relevant internal analyses Oracle was required to conduct pursuant to OFCCP's regulations.

OFCCP alleges that Oracle unlawfully refused to provide internal analyses (*e.g.*, pay equity and adverse impact analyses) Oracle was required to perform under 41 C.F.R. §§ 60-2.17(b)-(d) and 41 C.F.R. §§ 60-3.15A and 60-3.4. Am. Compl. ¶ 13. OFCCP also alleges that, if Oracle failed to produce these analyses because it did not conduct them, it defaulted on its obligations, which further supports OFCCP's discrimination and hiring claims. *Id* at ¶¶ 14-15.

Seven document requests are directly relevant to these allegations. OFCCP requested Oracle's pay equity analyses (including datasets used for the analyses) (RFP 71), actions taken in

response to the pay equity analyses (RFP 72), adverse impact analyses (RFP 78), and total in-depth employment analyses (RFP 80) that Oracle was required to perform pursuant to 41 C.F.R. § 60-2.17. Garcia Decl. at ¶ 10. OFCCP also requested Oracle's evaluation of hiring components/steps (RFP 79), and hiring and compensation validity studies (RFPs 87-88). *Id.* Except for RFPs 87-88, Oracle (1) made the same six boilerplate objections without support;[3] (2) privilege objections "to the extent" they applied, and (3) referral and legal conclusion objections. Garcia Decl. at ¶ 11. For RFPs 87-88, Oracle similarly made the boilerplate and privilege objections. *Id.* Oracle did not produce a privilege log to support its privilege claims. *Id.* On August 16, 2017, Oracle informally supplemented its responses, claiming for the first time that it had no responsive documents for any of the RFPs except 80.[4] Garcia Decl. at ¶ 13.

Oracle has made prior admissions demonstrating it has responsive material, despite its late-breaking claim to the contrary. Moreover, Oracle's objections are meritless and the requested information is clearly relevant and proportional. The Court should thus order Oracle to produce the requested documents.

A. Oracle's claims it does not have any responsive documents for six requests are belied by its previous admissions.

Oracle's new claim that responsive documents do not exist is either a misrepresentation or a coy attempt to hide relevant documents by misconstruing OFCCP's requests.[5] Indeed, when OFCCP's counsel asked Oracle if it conducted any pay analysis, Oracle responded that it did not

[3] The six unsupported boilerplate objections were: "overbroad in scope, uncertain as to time, unduly burdensome, oppressive, and encompassing documents not relevant to any party's claim or defense nor proportional to the needs of the case." Garcia Decl. at ¶ 12. The "to the extent" privileges were work product and attorney-client. *Id.* Oracle also made confidential/trade secret objections that were resolved with a protective order. *Id.* Lastly, its scope objection was resolved by the Court's Show Cause Order.

[4] Oracle's agreement to produce documents in response to RFP 80 does not satisfy RFPs 71 and 72, which are broader, specifically requesting the dates of the pay equity analyses, the datasets used in the analyses, and the actions taken in response. Moreover, producing documents it now acknowledges were conducted pursuant to 41 C.F.R. § 60-2.17 is insufficient if it is evading production of the pay equity analyses that the parties were discussing during the compliance review by now claiming they were not conducted pursuant to that regulation.

[5] Oracle made this claim in its third amended & supplemental response to this production set and after 24 hours of teleconferences, 25 formal letters and scores of e-mails addressing OFCCP's requests. Garcia Decl. at ¶ 14.

do pay equity analyses pursuant to OFCCP's regulations. Bremer Decl. at ¶ 2.

OFCCP's RPFs seeking documents regarding "pay equity analyses conducted pursuant to 41 C.F.R. § 60-2.17" follow discussions between OFCCP and Oracle and its counsel during the compliance evaluation admitting that Oracle conducted "pay equity analyses . . . as required by 41 C.F.R. § 60-2.17." On June 2, 2015, Shauna Holman-Harries, Oracle's Director of Diversity Compliance, responded via e-mail to OFCCP's request for "internal pay equity analysis conducted during the past three years, as required under 41 C.F.R. § 60-2.17" by stating:

> I refer you to the lengthy interview conducted with Lisa Gordon [Oracle's Director of Compensation for all employees save sales]. . . . . With regard to the pay audits to assess legal compliance with Oracle's non-discrimination obligations and to further ensure Oracle's compensation policies and practices are carried out, those are conducted by outside EEO compliance counsel at Orrick.

Garcia Decl. at ¶ 15. In this interview, Ms. Gordon and Ms. Holman-Harries confirmed that Oracle does pay equity analyses.[6] Following OFCCP's repeated requests for pay equity analyses conducted pursuant to 41 C.F.R. § 60-2.17, Ms. Holman-Harries again referred back to her June 2, 2015 email. Garcia Decl. at ¶ 17. On April 11, 2016, Oracle's counsel, Gary Siniscalco, reaffirmed that Oracle conducted pay equity analysis pursuant to 41 C.F.R. § 60-2.17 by stating:

> [W]ith regard to the request for *internal pay equity analysis* . . . our compensation director, Lisa Gordon, talked about the process followed to evaluate compensation at Oracle. We sent the e-mail version of the notes of that interview to Mr. Mikel and Ms. Yeh on February 10, 2015. *We again addressed our pay equity analysis in an email sent to Hea Jung Atkins on June 2, 2015.*

Garcia Decl. at ¶18, emphasis added. Finally, Mr. Siniscalco admitted during the conciliation that he personally conducted Oracle's pay equity analysis.[7] Decl. of Jane Suhr at ¶5. These

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[6] Ms. Gordon stated: "we don't do equity studies regularly but may do ad hoc analyses" and Ms. Holman-Harries stated: "compliance does equity studies" in response to the question: "Does Oracle conduct pay equity studies," Garcia Decl. at ¶ 16.

[7] To the extent Oracle claims that conciliation discussions at the October 6, 2016 meeting are privileged, Oracle waived the privilege by affirmatively disclosing and relying on evidence about that meeting. *E.g.*, Siniscalco Decl. ISO MSJ for Failure to Conciliate ¶¶ 9-10 (disclosing discussions at 10/6/16 meeting); *see also Apple Inc. v. Samsung Elec. Co., Ltd.*, 306 F.R.D. 234, 241 (N.D. Cal. 2015) (noting that privileges cannot be used as a sword and

admissions demonstrate that Oracle has documents responsive to requests for pay equity analyses performed pursuant to 41 C.F.R. § 60-2.17. Further, Oracle's new claim that any pay equity analysis was not done pursuant to this regulation is belied by Ms. Holman-Harries' statement that Oracle did them "to assess legal compliance with Oracle's non-discrimination obligations." After the statements that Oracle and its counsel made during the compliance review that pay equity analyses pursuant to the regulations were conducted, and OFCCP's reliance on these statements in drafting the RFPs, Oracle cannot now dodge these RFPs by claiming that the pay equity analyses were not conducted pursuant to the regulation.

Oracle also admitted that it had documents responsive to RFPs 79, 87 and 88. While Oracle identified a number of RFPs where it had no responsive documents, it did not do so for these RFPs.[8] By now claiming it has no responsive documents, it appears Oracle is playing some kind of game and not disclosing information about documents it previously deemed responsive.

B. Oracle waived its privilege objections, which are in any event meritless.

Oracle objected to the analyses production described above based on the work product and the attorney client privileges.[9] Oracle now claims it is not withholding documents based on privilege. Bremer Decl. ¶ 2. To the extent that it seeks to claim privilege for documents that exist and that it now claims are not responsive, Oracle waived any privilege objections because of its failure to produce a privilege log five months after the discovery responses were due. *Burlington*

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a shield and that "once privileged information is affirmatively relied on, any privilege that may attach is impliedly waived.").

[8] In an April 14, 2017 letter Oracle stated it did "not intend to produce" the documents that were responsive to a number of requests, including 79, 87, and 88. Oracle said this after previously identifying for other RFPs when it did not have responsive documents. Garcia Decl. at ¶ 19.

[9] Oracle has not claimed the self-evaluation privilege for its analyses and evaluations, and cannot since federal courts refuse to apply it to government agencies. *See, e.g., Fed. Trade Comm'n v. TRW Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980) ("Whatever may be the status of the 'self-evaluative' privilege in the context of private litigation, courts with apparent uniformity have refused its application where, as here, the documents in question have been sought by a governmental agency"). If Oracle attempts to assert this privilege now, the privilege should be deemed waived. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) ("[F]ailure to object to [document] requests within the time required constitutes a waiver of any objection.").

N. & Santa Fe Ry. Co., 408 F.3d 1149 (9th Cir. 2005) (affirming waiver of privileges from a sophisticated party when it did not produce a privilege log within five months of claiming privilege). Here, Oracle produced responses on March 7 and 27, 2017 – five months ago, and still has not produced a privilege log. Garcia Decl. at ¶ 20. Thus, Oracle waived these objections.

Even if entertained, Oracle cannot meet its burden of establishing that the privileges apply. *See PNC Equip. Fin., LLC v. Cal. Fairs Financing Auth.*, 2012 WL 2505034 *1 (E.D. Cal. 2012) (party alleging privilege bears the burden of establishing it).

The work product doctrine is designed to protect materials prepared by an attorney acting on behalf of his client in anticipation of litigation. *United States* v. *Nobles,* 422 U.S. 225, 237-38 (1975). However, the documents sought are "created in anticipation of litigation" because Oracle is required by regulations to conduct these analyses and it is required to produce them to OFCCP upon request. *See* 41 C.F.R. §§ 60-2.32, 60-3.4(A), 3.5(D), 3.15; *see also United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011) (work product doctrine inapplicable to documents created to comply with the law because doctrine applies to documents created "because of" an anticipation of litigation and that "would not have been created in substantially similar form but for the prospect of litigation.").[10] Furthermore, these documents cannot be eligible for work product protection since conducting these analyses and evaluations is "a task that could just as well have been performed by a non-lawyer." *Trammel v. United States,* 445 U.S. 40, 41 (1980).

The attorney client privilege similarly is not applicable to the analyses sought. "The party asserting the privilege bears the burden of proving each essential element." *U.S. v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009). Furthermore, "the attorney-client privilege is strictly construed." *Id.* at 609. Oracle here has not met its burden to show the information is protected by the attorney-client privilege because the primary purpose of Oracle's analyses and evaluations was not to seek legal advice. *Id.* at 607 (privilege applies only "(1)[w]here legal advice of any kind is

[10] *See also United States v. Adlman,* 134 F.3d 1194, 1195 (2nd Cir. 1998) (same); *Nat'l Union Fire Ins. v. Murray Sheet Metal*, 967 F.2d 980, 984 (4th Cir. 1992) (materials prepared "pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation").

sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence"). Oracle had a pre-existing duty to prepare them and make them available to OFCCP upon request. Under similar circumstances, an OALJ recently compelled the production of adverse impact analyses precisely for this reason. *OFCCP* v. *JBS USA Holdings, Inc.,* 2015-OFC-1, at 6-8 (ALJ April 22, 2016) (compelling production of internal audits after finding primary purpose was regulatory compliance); *see also United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) (to show communication relates to legal advice, proponent "must demonstrate that the 'primary purpose' of the communication was securing legal advice"). Any privilege assertion also fails because the documents were not "made in confidence" since it could be required to produce them to OFCCP. *Ruehle* 583 F.3d at 609; *cf Emerson Elec. Co.,* 609 F.2d at 907.

Finally, OFCCP is not seeking documents that contain any communications between Oracle and its attorney for the purpose of its attorneys rendering legal advice. Rather, OFCCP is simply seeking Oracle's analyses and the facts upon which they were based, which are not protected by privilege. *Upjohn Co. v. US*, 449 US 383, 395-96 (1981) ("[a] party cannot conceal a fact merely by revealing it to his lawyer.").

C. Oracle's argument that the requests are improper because they refer to regulations lacks merit.

Contrary to Oracle's novel and baseless objections, the requests do not require Oracle to conduct new research, interpret the regulations or make legal conclusions. Nor is OFCCP asking Oracle to now conduct an evaluation or an in-depth analysis. Instead, OFCCP simply seeks the documents Oracle previously created and the underlying facts and data it used to create them consistent with regulatory requirements. Oracle also waived its strained objection based on Rule 34 since it was made after its written responses. *Safeco Ins. Co. of Am. v. Rawstrom*, 183 F.R.D. 668, 671 (C.D. Cal. 1998) ("objections not included in a timely response are waived").

D. Oracle's unsupported boilerplate objections are belied by OFCCP's Amended Complaint and are waived because of insufficient support.

Contrary to Oracle's unsupported boilerplate objections, OFCCP put Oracle's compliance at issue in its Amended Complaint. Paragraph 13 specifically identifies that Oracle failed to produce any documents to demonstrate compliance with 41 C.F.R. § 60-2.17, (RFPs 71, 72, 80), 41 C.F.R. § 60-3.15A (RFP 78) and 41 C.F.R. § 60-3.4 (RFP 79). Furthermore, the 41 C.F.R. §60-3.4 reference put the validation studies at RFPs 87-88 at issue since Oracle was required to conduct them for any step or component of its selection process causing adverse impact.

Additionally, Oracle's claims that OFCCP's requests are irrelevant because OFCCP failed to make disparate impact claims or identify employee selection procedures are red herrings because OFCCP is not required to, nor did it, limit the case to a particular theory of discrimination or identify the particular practices allegedly causing the disparities. *OFCCP v. Honeywell, Inc.*, Case No. 77-OFCCP-3 (ARB June 2, 1993) (under rules of procedure "no procedural election between alternative legal theories [of disparate impact and disparate treatment] is required of a claimant at either pre-trial, or appellate stages"). If Oracle conducted analyses or evaluations of its hiring or compensation processes, these would be highly relevant to the discrimination claims and must be provided.

Moreover, contrary to Oracle's claims, these requests did not apply to Oracle's total employment process for all job positions for all organizations at its headquarters. Instead, they were narrowly tailored to the specific job groups and lines of business at issue.

Lastly, Oracle waived these six boilerplate objections because they were unsupported with any factual information to evaluate them.[11]

[11] *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (objections to document requests of overly broad, burdensome, oppressive, and irrelevant were insufficient to meet objecting party's burden of explaining why discovery requests were objectionable); *Verona Energy, Inc., v. J K Petroleum*, 2017 U.S. Dist. LEXIS 420, at *3 (W.D. La. 2017) ("Conclusory objections that the requested discovery is· 'overly broad,' 'burdensome,' 'oppressive,' and 'irrelevant,' do not suffice."). *Kellgren v. Petco Animal Supplies, Inc.*, 2016 WL 4097521, at *2 (S.D. Cal. 2016) ("Boilerplate and unsupported objections, stated without further clarification or reason, are ineffective and deemed waived by this Court.").

III. Courts Routinely Compel Employers to Produce Employee Contact Information Without the Stringent, Cumbersome Protections Oracle Requests.

OFCCP seeks the contact information of current and former Oracle employees within the affected groups so that it can speak to potential employee-witnesses and amass further anecdotal evidence that "is important to bring [the agency's] discrimination claims convincingly to life." *Wellens v. Daiichi Sankyo Inc.*, 2014 WL 969692, at *3 (N.D. Cal. 2014). As the Supreme Court has recognized, the Secretary of Labor necessarily relies upon "'information and complaints received from employees seeking to vindicate rights claimed to have been denied.'" *Kasten v. St.-Gobain Performance Plastics Corp.*, 531 U.S. 1, 11-12 (2011). The Supreme Court has also acknowledged these same concerns with respect to Title VII. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (recognizing enforcement of Title VII depends on communications and cooperation between employees and officials); *see also* 79 Fed. Reg. 55712-02, 55715 (interviewing "employees potentially impacted by discriminatory compensation" is "an invaluable way for [OFCCP] to determine whether compensation discrimination in violation of Executive Order 11246 has occurred and to support its statistical findings.") (Sept. 17, 2014).

Even when private plaintiffs seek to vindicate employees' rights under Title VII, rather than a federal agency, courts routinely compel disclosure of employee contact information in employment litigation for all affected employees over employers' objections.[12]

A. The Narrowed Sampling Oracle Proposes Is Unwarranted and Would Prejudice OFCCP.

Consistent with standard practice in employment cases, OFCCP seeks contact

[12] *See, e.g., id.* at *4; *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011); *Robinson v. Chefs' Warehouse*, 2017 WL 836943, at *2-3 (N.D. Cal. Mar. 3, 2017); *Salazar v. McDonald's Corp.*, 2016 WL 736213, *5-*6 (N.D. Cal. Feb. 25, 2016); *McCowen v. Trimac Transp. Servs. (W.), Inc.*, 2015 WL 5184473, at *4 (N.D. Cal. Sept. 4, 2015); *Salgado v. O'Lakes*, 2014 WL 7272784, at *14 (E.D. Cal. Dec. 18, 2014); *Brawner v. Bank of Am., N.A.*, 2014 WL 6845504, at *4 (N.D. Cal. Dec. 4, 2014); *Bell v. Delta Airlines, Inc.*, 2014 WL 985829, at *4 (N.D. Cal. Mar. 7, 2014); *Benedict v. Hewlett-Packard Co.*, 2013 WL 3215186, at *1 (N.D. Cal. June 25, 2013); *Coleman v. Jenny Craig, Inc.*, 2013 WL 2896884, at *12 (S.D. Cal. June 12, 2013); *York v. Starbucks Corp.*, 2009 WL 3177605, at *1 (C.D. Cal. 2009); *Babbitt v. Albertson's, Inc.*, 1992 WL 605652, at *6 (N.D. Cal. 1992).

information for all current and former employees subject to the hiring and compensation discrimination OFCCP alleges in its complaint. Citing the decision in *OFCCP v. Google*, Oracle seeks to limit its production of employee contact information to 20 percent of those "individual contributors" within the Product Development, Information Technology, and Support lines of business in which OFCCP claims compensation discrimination. Oracle's limits, which ignore current and former employees subject to OFCCP's hiring discrimination claims, are unjustified.

First, the reasoning in the *Google* decision, even if it were to survive appellate review,[13] is inapplicable. Unlike *Google*, which involves a comprehensive compliance evaluation to determine whether any nondiscrimination violations exist at an entire facility, OFCCP here is litigating claims against Oracle for hiring and compensation discrimination in specific groups at its Redwood Shores campus. To that end, OFCCP is seeking contact information only for those current and former employees within the scope of the agency's discrimination claims, a targeted, narrower set of information than what is sought in *Google*.

Second, courts routinely order disclosure of employee contact information without sampling, including in cases involving more employees. At the August 14 conference, Oracle's counsel represented that, for the 2013-2014 period, OFCCP's request implicates fewer than 4,500 employees. Even assuming that the number of employees swelled to 8,000 for the total relevant period, this figure is no more than the 8,000 OFCCP may seek in *Google* and a fraction of what courts have ordered in other cases. *E.g.*, *Benedict*, 2013 WL 3215186, at *3 (over 20,000 employees); *York*, 2009 WL 3177605, at *1 (over 124,606 employees); *Babbitt*, 1992 WL 605652, at *6 (40,000 current and former employees). Oracle has not contended it will incur an unduly burdensome cost based on the numbers of employees at issue.[14]

[13] The Administrative Review Board set a briefing schedule in that case, and OFCCP anticipates taking exception to the portion of the *Google* decision concerning contact information.

[14] And, the number of employees at issue is irrelevant to Oracle's privacy objections. Even if the right to privacy applied, the proper inquiry is into the intrusion into each employee's interests, not the number of subject employees. *See Puerto v. Superior Court*, 158 Cal. App. 4th 1242, 1256 (2008) (rejecting analysis based on "the large number of witnesses identified . . . , rather than the actual significance of the privacy invasion with respect to each witness").

Third, the sampling procedure identified in *Google* would delay discovery further, prejudicing OFCCP. In *Google*, OFCCP is permitted to request the contact information for up to 8,000 individuals the agency identifies. This procedure adds another step to the production process that would further delay production—requiring OFCCP to name the specific applicants and employees for whom it seeks information—and is particularly inappropriate here, since Oracle has yet to produce the data on which OFCCP would make such a determination.

Finally, there is no need to limit discovery to the "individual contributor" group. Oracle has suggested this limit is necessary based on California Rule of Professional Conduct ("CRPC") 2-100.[15] While OFCCP agrees that high-level officials, such as President of Product Development Thomas Kurian, fall within the scope of CRPC 2-100, Oracle offers no evidence that all non-individual contributors are subject to the rule. Even if it had, the professional responsibility rules do not bar discovery of contact information. As the California Supreme Court explained, having trial courts "enforce the rules governing the bar in every discovery matter would heap a tremendous additional burden on those courts, and, in our view, unwisely complicate matters." *Colonial Life & Accident Ins. Co. v. Superior Court*, 31 Cal. 3d 785, 795 (1982); *see also Acosta v. JY Harvesting, Inc.*, 2017 WL 3437654, at *5 (S.D. Cal. 2017) (holding CRPC 2-100 objection not ripe because Secretary had not sought to "depose or otherwise interview" the "crew leaders, foremen or supervisors" for which contact information was requested).

Oracle's proposed limits on the scope of its production are wholly unjustified.

B. Oracle's Proposed *Belaire* Process Is Inapplicable, Unnecessary, and Time-Consuming.

On July 27, almost six months after OFCCP made its request, Oracle stated for the first time that it would produce contact information if the agency agreed to follow the *Belaire* notice

[15] The CRPC prohibits attorneys from contacting "[a]n officer, director, or managing agent of a corporation" or "an employee of . . . [a] corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

and opt-out process. *See Belaire-W. Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554, 556-57 (2007); Bremer Decl. ¶ 5. This process does not apply to federal agencies and will further delay production and increase litigation costs.

1. The *Belaire* process and California's right to privacy do not constrain OFCCP or other federal agencies.

Oracle contends that OFCCP must participate in a *Belaire* process and abide by the right to privacy under the California Constitution, "which 'protects the individual's *reasonable* expectation of privacy against a *serious* invasion.'" *Belaire*, 149 Cal. App. 4th at 558 (citations omitted). However, when asked, Oracle could not identify any authority imposing this state process, applied to private plaintiffs, on federal agencies. Oracle's inability to do is understandable: it is hornbook constitutional law that, unless Congress says otherwise, state law cannot restrict the federal government. *Boeing Co v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014) (citation omitted). Under the doctrine of intergovernmental immunity, absent clear and unambiguous congressional authorization, state laws cannot directly regulate the functions of the federal government and are unenforceable to the extent they seek to do so. *See United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (noting state laws incidentally regulating the federal government are unenforceable). Subjecting OFCCP to a *Belaire* process is precisely what the Supremacy Clause and the intergovernmental immunity doctrine forbid. As a federal agency, OFCCP need not comply with a process fashioned by a state court in furtherance of a state right. *See, e.g.*, *Hancock v. Train*, 426 U.S. 167, 180-81 (1976) (holding that military and federal agencies were not required to obtain state permits to operate).

Moreover, even state law does not support Oracle's proposal. The California Constitution protects only an "individual's *reasonable* expectation of privacy against a *serious* invasion." *Belaire*, 149 Cal. App. 4th at 558 (emphasis in original; citation omitted). However, OFCCP's request for contact information implicates neither a reasonable expectation of privacy nor a serious invasion of such an expectation. When evaluating whether current and former employees had a reasonable expectation of privacy in their contact information, *Belaire* explained that

"employees gave their address and telephone number to their employer with the expectation that it would not be divulged externally *except as required to governmental agencies* (such as the Internal Revenue Service, the Social Security Administration, etc.)." 149 Cal. App. 4th at 561 (emphasis added). In other words, while employees may have a reasonable expectation of privacy with respect to private third parties, no similar expectation applies with respect to governmental agencies. Moreover, *Belaire* explained that employees can "reasonably be expected to want their information disclosed to a class action plaintiff who may ultimately recover for them unpaid wages that they are owed." *Belaire*, 149 Cal. App. 4th at 561.

Even if there were a reasonable expectation of privacy, OFCCP's request for contact information would not constitute a serious invasion. Oracle has already agreed to produce the names and detailed data about individuals in the affected groups as part of its data production. It is apparent that Oracle's objection to providing these individuals' contact information stems not from a concern about a serious invasion of their privacy, but rather a concern that they might provide damaging information to OFCCP. In *Puerto v. Superior Court*, after the employer had already disclosed 2,600 employees' identities to private plaintiffs, the court found "no evidence that disclosure of the contact information for these already-identified witnesses is a transgression of the witnesses' privacy that is sufficiently serious" to impinge upon the right to privacy. 158 Cal. App. 4th 1242, 1254 (2008) (citation omitted). The court explained that "the information sought by the petitioners here—the location of witnesses—is generally discoverable, and it is neither unduly personal nor overly intrusive." *Id.* Thus, disclosing contact information, in addition to the detailed information Oracle already agreed to disclose, is even less of an invasion of privacy and certainly does not constitute a "serious" invasion of privacy.

Thus, even if OFCCP were required to subject itself to California law, Oracle's privacy would not prevent the disclosure of contact information.

2. **The existing Protective Order and federal statutes afford sufficient safeguards.**

Even if Oracle could subject OFCCP to California law and OFCCP's request triggered

state privacy protections, the existing protective order and various federal statutes afford sufficient safeguards. Thus, a *Belaire* process is unnecessary.

Courts recognize that contact information "is not particularly sensitive." *Algee*, 2012 WL 1575314, at *5; *York*, 2009 WL 3177605, at *1 (same and expressing "confiden[ce] that most of this information for most of these employees is already publically available"); *Artis*, 276 F.R.D. at 353 ("The privacy interests at stake in the names, addresses, and phone numbers must be distinguished from those more intimate privacy interests such as compelled disclosure of medical records and personal histories."). Thus, in cases involving private civil plaintiffs, courts have held that producing contact information "pursuant to a protective order is one way to protect the privacy interests of putative class members." *Wellens*, 2014 WL 969692, at *3.[16]

Here, numerous protections already exist to safeguard employees' contact information, eliminating any need for a *Belaire* process. The Protective Order restricts the dissemination of "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and extend through the entire period OFCCP holds the information." Protective Order §§ 2.2 (incorporating 5 U.S.C. § 552(b)(6)), 4, 13. The Privacy Act adds an additional layer of protection, imposing civil and criminal liability for the improper disclosure of information about individuals. *See* 5 U.S.C. § 552a(g), (i); *see also Williams v. Shinseki*, 161 F. Supp. 3d 91, 94 (D.D.C. June 4, 2012) (refusing to compel production of "home telephone numbers or addresses" based on Privacy Act objection). Such statutory protections quell confidentiality concerns. *See, e.g.*, *Equal Employment Opportunity Comm'n v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (holding "confidentiality is no excuse" for not responding to subpoena based on criminal penalties for improper disclosure); *EEOC v. St. John Hosp. & Med. Ctr.*, 2012 WL 3887626, at *9 (E.D. Mich. 2012) (overruling privacy objection based on criminal penalties).

Nevertheless, Oracle argues that these protections are insufficient. First, Oracle notes that

[16] *See also McCowen*, 2015 WL 5184473, at *4 (same); *Salgado*, 2014 WL 7272784, at *12 (same); *Brawner*, 2014 WL 6845504, at *4 (same); *Bell*, 2014 WL 985829, at *4 (same).

the Protective Order lacks an "attorney's eyes provision." August 8, 2017, Connell Ltr. to ALJ Larsen ("Oracle Ltr.") at 6. However, while some courts require such a protection in private civil cases, here, criminal penalties for improper disclosure—which apply to any federal officer or employee, not just attorneys—exist under the Privacy Act. *See* 5 U.S.C. § 552(i). Second, Oracle notes that OFCCP can share information with other law enforcement agencies and use the information "in other Oracle matters." Oracle Ltr. at 6. But employees, who are taxpayers, should expect their law enforcement agencies to operate efficiently, sharing information as necessary. Third, Oracle complains that "OFCCP can keep the information in perpetuity." *Id.* However, regardless of how long OFCCP retains the records as mandated by the Records Disposal Act, the information remains protected under the Protective Order and the Privacy Act.

Oracle also suggests that additional protection is needed here because OFCCP requests home and mobile telephone numbers and email addresses. However, that OFCCP requests non-work contact information does not raise additional privacy concerns, let alone concerns requiring additional protection. *Sandres*, 2011 WL 475068, at *4 (requesting "residential telephone numbers and addresses for percipient witnesses is 'ordinary' and 'routine' and does not constitute a serious invasion of privacy rights") (quoting *Puerto*, 158 Cal. App. 4th at 1251-52). Thus, not surprisingly, personal street addresses, email addresses, and phone numbers are ordered disclosed *without* a *Belaire* process. *E.g.*, *Robinson*, 2017 WL 836943, at *3 (ordering production of "home addresses, phone numbers, email addresses" without *Belaire* process).[17]

One final fact weighs against imposing a *Belaire* process: the fast-approaching fact discovery deadline. Oracle's delay in proposing a *Belaire* process is reason alone to deny its request. *See, e.g.*, *Robinson*, 2017 WL 836943, at *3 ("Given the passage of time . . . , Defendant

[17] Oracle cites a 2013 decision in *Willner v. Manpower, Inc.*, in which the magistrate judge required a *Belaire* process because telephone numbers were sought. Oracle Ltr. Larsen at 6 n.16. However, in a more recent case, the same magistrate judge was persuaded that such a process was not necessary, holding that only a protective order was necessary to protect employees' telephone numbers and email addresses. *Salazar*, 2016 WL 736213, at *5. While the magistrate judge ordered production pursuant to an attorneys' eyes only provision, as explained above, such a requirement is not necessary here given the additional statutory protections afforded in this case.

is ordered to produce the contact information without allowing putative class members an opportunity to opt-out."); *Coleman*, 2013 WL 2896884, at *11 (finding "that a protective order is sufficient and more efficient in light o[f] the fact that Plaintiff's motion for class certification deadline is fast approaching").

Thus, to the extent privacy safeguards are necessary, they already exist under the Protective Order and federal law. A *Belaire* process would be extraneous and delay discovery further.

CONCLUSION

For the foregoing reasons, OFCCP respectfully requests that the Court compel Oracle to produce documents responsive to OFCCP's 1st and 2nd sets of requests for production of documents by dates certain (as outlined on pages 4-5), compel Oracle to produce documents responsive to RFPs 71, 72, 78, 79, 80, 87, 88, and 83, and amend the scheduling order.

Respectfully submitted,

Date: August 18, 2017

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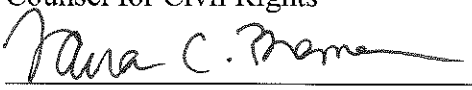

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CERTIFICATE OF SERVICE

I am over 18 years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On August 18, 2017, I served the foregoing **PLAINTIFF'S MOTION TO COMPEL AND FOR ORDER SETTING PRODUCTION SCHEDULE** on Defendant Oracle America, Inc. by serving its attorneys below via electronic mail, pursuant to the parties' agreement:

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I declare under penalty of perjury that the above is true and correct.

Date: August 18, 2017

LLEWLYN ROBINSON